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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: CS Docket No. 95-184
MM Docket No. 92-260

Dear Mr. Caton:

Enclosed on behalf of Cox Communications, Inc. are its comments in the above-referenced proceeding. It is requested that these comments be accepted this date and associated with the docket. As a result of an error, these comments were misdirected and were not filed with your office yesterday.

Sincerely yours,

Peter H. Feinberg

PHF/crw
Enclosure

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SEP 26 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Telecommunications Services Inside Wiring	)	CS Docket No. 95-184
	)	
Customer Premises Equipment	)	
	)	
	)	
In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-260
	)	
Cable Home Wiring	)	

COMMENTS OF COX COMMUNICATIONS, INC.
ON FURTHER NOTICE OF PROPOSED RULEMAKING

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(202) 296-4933

September 26, 1997

SUMMARY

Cox commends the Commission's effort to encourage competition among video service providers in multiple dwelling units ("MDUs"). As the nation's fifth largest cable operator, Cox has long competed for access to MDU residents to provide a range of video services. Where it does provide service, it typically signs a five-year, non-exclusive contract that permits the landlord to also secure services from another provider. The key to MDU competition is to ensure that it is the subscriber, not the landlord, that makes the service provider choice.

Gaining access to individual MDU subscribers has become even more important as Cox has begun offering new non-video services, such as high-speed data and residential telephony, to the MDU market. These services can be delivered over a common wire where Cox also provides video service in the building, or over a separate Cox network where another company provides video service in the MDU. With their high concentration of potential subscribers in one place, MDUs are highly attractive locations in which to roll out new services. Cox therefore supports regulations designed to prevent landlords from serving as anti-competitive gatekeepers who are more interested in enriching themselves than in providing their tenants with a full array of competitive communications service options.

Unfortunately, in the MDU environment, there is only so much the Commission can do. Section 624(i) of the Communications Act places clear limits on the Commission's ability to affect the disposition of MDU wiring <u>outside</u> the individual subscriber's premises when cable service is terminated. Those limits, in Cox's view,

preclude the Commission from adopting additional cable inside wiring rules for MDUs beyond the FCC regulations that already exist.

Cox recognizes, however, that the Commission may well take a more expansive view of its authority to act in this area. Should it do so, Cox urges the Commission to strike directly at the heart of the matter. As the Further Notice observes repeatedly, and as the record amply supports, the real problem is MDU owners' resistance to allowing multiple sets of home run wiring to be installed in their buildings. This resistance hampers competition in the video marketplace and in the equally important markets for data and telephony. The simplest and most effective way for the Commission to overcome this reluctance -- and to promote full, facilities-based competition -- is to require landlords to permit the installation of multiple broadband networks, including home run wiring, in MDUs.

In the event the Commission decides not to pursue this route, it at a minimum should modify the proposals described in the Further Notice to better promote individual subscriber choice and to better protect the legitimate rights of incumbent service providers. First, the Commission should ensure that the new rules do not apply where the MDU owner receives direct or indirect consideration from the service provider it has selected, or where it signs an exclusive contract with that provider. Second, the rules should give the incumbent operator sufficient opportunity to exercise whatever rights it may have under state and local law. Third, the Commission should not adopt any presumption regarding the rights of operators under state law to maintain their wiring on MDU premises when their service contracts expire. Fourth, the Commission should take great care that the new rules do not abrogate or preempt video service contracts and that

MDU owners are bound to contractual terms governing the disposition of inside wiring to which they voluntarily agree. Fifth, the Commission should make the sale of inside wiring a real option for incumbent operators by providing that if the landlord or alternative provider refuses to purchase the wiring at replacement cost, the landlord must choose between either (a) allowing the incumbent to maintain its wiring on the premises and preclude other uses or (b) requiring the incumbent to remove the wiring at the landlord's expense. And, sixth, the Commission should not require video service providers to sell inside wiring to MDU owners upon installation.

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Washington, DC 20554

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COMMENTS OF COX COMMUNICATIONS, INC.
ON FURTHER NOTICE OF PROPOSED RULEMAKING

Cox Communications, Inc. ("Cox"), by its attorney, hereby submits its comments on the Further Notice of Proposed Rulemaking (FCC 97-304, released August 28, 1997) ("Further Notice") in the above-referenced proceeding.

I. INTRODUCTION

Throughout this proceeding, the Commission has struggled with an issue that has long daunted the cable industry: how to persuade recalcitrant landlords to permit video service providers to install facilities in multiple dwelling units ("MDUs"). Cable operators have tried for years to secure an enforceable right of access to MDUs. Those efforts have been successful so far in roughly 13 states. As competition has blossomed in the multichannel video programming marketplace, industry newcomers find themselves facing a similar dilemma. Some MDU owners, for whatever reason, do not want a second video service provider to place additional facilities, including home run wiring, in their buildings.

As the Notice recognizes, there is no doubt that the most pro-competitive outcome is for MDU owners to permit the installation of a second broadband network throughout their buildings.[1] Running a second wire to each individual unit is the best way of ensuring that apartment and condominium dwellers have a real choice among service providers. This flexibility is particularly important in an era in which companies such as Cox are redefining themselves by offering not only video but also a variety of data and voice services over the same broadband plant.[2] Having two wires at their threshold gives MDU residents the freedom to choose one company for some broadband services and a second company for others – the very sort of competition envisioned by Congress when it passed the Telecommunications Act of 1996.

Unfortunately, Congress has strictly limited the ammunition the FCC can use to attack MDU owners' anti-competitive maneuvers. The Commission's ability to act is confined to the rules it was directed to prescribe pursuant to Section 624(i) of the Communications Act. Those rules[3] govern "the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator <u>within the premises</u>

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[1] Further Notice at ¶ 62 ("we recognize that subscriber choice would be enhanced by the use of multiple wires").
[2] As the country's fifth largest MSO, Cox remains committed to providing a full range of voice, video and data services to both business and residential customers over its two-way, upgraded broadband networks. In addition to video programming services, Cox currently is providing high-speed data services in five of its large urban systems. It also recently rolled out residential local telephone service on a commercial basis in Orange County, California, with other clustered systems to follow in 1998.
[3] <u>See</u> 47 C.F.R. §§ 76.801-76.802.

of such subscriber."[4] There is no ambiguity about the limited nature of this grant of authority. The Commission may not stray beyond the boundaries established by Section 624(i).

Should the Commission nonetheless reach a contrary conclusion, the Commission should revisit its conclusion that "requiring MDU owners to permit multiple wires is [not] a viable option at this time."[5] Adopting a rule requiring landlords to permit the installation of multiple sets of internal wiring, including home run wiring, is the simplest, most pro-competitive solution to the problem the Commission is attempting to solve. In the event the Commission proceeds with its current proposal, the proposed rules should be modified as discussed below to better promote individual subscriber choice and protect the legitimate rights of incumbent service providers.

II. THE COMMISSION LACKS AUTHORITY TO ADOPT THE PROPOSED RULES.

A. The Commission May Regulate Only Wiring Inside Subscriber Premises

The Further Notice tentatively concludes that the Commission can use its residual powers under Section 4(i) of the Communications Act to promulgate the proposed rules. As the Notice itself recognizes, however, Section 4(i) permits the Commission to take action not expressly authorized by Congress only where Congress has not "directly spoken to the precise question at issue."[6] Here, Congress has described the contours of the FCC's jurisdiction over MDU inside wiring – and has drawn them quite narrowly.

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[4] Section 624(i) of the Communications Act of 1934, 47 U.S.C. § 544(i), as amended (emphasis supplied).
[5] Further Notice at ¶ 62.
[6] Mobile Communications Corp. v. FCC, 77 F.3d 1399, 1404-05 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 81 (1996).

The FCC thus cannot rely on Section 4(i) to justify rules which Congress clearly has indicated it does not want the Commission to adopt. Moreover, the Commission has no other statutory authority on which to base jurisdiction over MDU inside wiring.

In Section 624(i) of the Act, Congress directed the Commission to adopt rules concerning the disposition of cable inside wiring "within the premises of [the] subscriber" when cable service is canceled. The Commission, of course, has done so. At the same time, Congress intentionally refrained from authorizing the Commission to adopt rules for disposing of cable inside wiring <u>outside</u> the subscriber's premises. As stressed in the legislative history, "[i]n the case of multiple dwelling units, this section is not intended to cover common wiring within the building, but only the wiring within the dwelling unit of individual subscribers."[7] The section thus "<u>limits</u> the right to acquire home wiring to the cable installed within the interior premises of a subscriber's dwelling unit."[8]

Congress' wishes could not be clearer. The Commission was authorized to adopt rules for disposing of cable wiring inside the subscriber's dwelling and no more. The notion that Section 624(i) establishes "the minimum, not maximum, level of authority the Commission may exercise over cable inside wiring"[9] is belied by both the language and the legislative history of that provision. Moreover, a belief that the proposed rules will not cause the damage feared by Congress when limiting the FCC's authority is irrelevant.[10] Only Congress can change its mind about the appropriate treatment of

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[7] H.R. Rep. No. 628, 102d Cong., 2d Sess. at 119 (1992).
[8] <u>Id</u>. at 118 (emphasis supplied).
[9] Further Notice at n.147.
[10] As the Further Notice recognizes, Congress limited the Commission's authority in this area in part out of concern over the potential for theft of service and signal leakage. <u>Id</u>. at n.153 and n.154.

wiring outside the individual subscriber's premises. The Commission cannot change Congress' mind for it.

Since Congress has "spoken on the precise question at issue" and has not authorized further FCC action, the Commission cannot draw on Section 4(i) to adopt the proposed rules.

B. If the Commission Adopts New Rules, It Should Require MDU Owners to Permit the Installation of Multiple Sets of Home Run Wiring

If the Commission reaches a contrary conclusion and finds that it has broad authority under Section 4(i) to adopt rules governing MDU inside wiring, it should re-evaluate its position that "requiring MDU owners to permit multiple wires is [not] a viable option at this time."[11] The very problem the Commission is trying to ameliorate in this proceeding is "property owners' resistance to the installation of multiple sets of home run wiring in their buildings," which "may deny MDU residents the ability to choose among competing service providers, thereby contravening the purposes of the Communications Act . . ."[12] As the extensive record in this proceeding establishes, overcoming that resistance and encouraging facilities-based competition is the best means of ensuring that subscribers in MDU units have a full range of competitive options for both video and non-video services.

With two broadband wires at their disposal, subscribers could tailor their choice of service provider to the specific services they wish to receive. One company could provide basic video and high-speed data services, for example, while another provided

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[11] Id. at ¶ 62.
[12] Id. at ¶ 26 (footnote omitted).

premium video services such as pay-per-view. Although the Further Notice touts the benefits that flow from "affording consumers a choice among various packages offered by multiple service providers," competition is even better off if consumers have the ability to create their own service packages.[13]

The most straightforward way for the Commission to promote full, facilities-based competition is simply to require landlords who already have allowed the construction of one video network to permit the installation of additional inside wiring, including home run wiring, in their buildings. In Cox's experience, there are few physical obstacles to installing multiple sets of inside wiring in MDUs that cannot be overcome. Although some commenters claim generally that "property owner[s] often cannot give an alternative video provider the space necessary to compete in the building" or have insurmountable aesthetic concerns,[14] the facts in the record contradict these assertions.

As the Further Notice observes, Time Warner has demonstrated that there at least 143 buildings in Manhattan in which two competing video networks have been installed.[15] Similarly, Cablevision reports that it provides service to at least 353 MDUs with two internal video distribution systems.[16] The Further Notice observes that the "presence of multiple wires in the MDUs cited by Cablevision is substantially due to the

[13] The statement in the Further Notice that "[c]able operators' ability to compete in the telephony market should be largely unaffected" if they lose the right to use their home run wiring (Further Notice at ¶ 46) is erroneous. Being forced to relinquish ownership of the inside wiring in an MDU means that the cable operator will not be able to use that wire to provide other, non-video services. A requirement that video and non-video services always be bundled together inevitably will limit consumer choice and dampen competition.

[14] Id. at ¶ 25 and n.68.

[15] Id. at ¶ 28.

[16] Id. at ¶ 30.

existence of state mandatory access statutes and not to a desire for multi-wire competition on the part of property owners."[17] This is precisely Cox's point. Where video service providers have the force of law behind them, the space, cost and aesthetic issues thrown up by MDU owners as objections to the installation of multiple sets of inside wiring somehow disappear.

The Further Notice acknowledges that "subscriber choice would be enhanced by the use of multiple wires."[18] If the Commission is satisfied that it has extensive rulemaking authority under Section 4(i), then it is unclear why a Commission requirement that MDU owners permit the installation of additional inside wiring is not "a viable option at this time."[19] The policy predicates for such a direct approach are laid out extensively in the Further Notice. The only barrier to adoption of such a rule, in Cox's view, would be the Commission's lack of authority to adopt any rule governing home run wiring.[20]

If, however, the Commission is correct in its analysis of the scope of Section 4(i), then it would be able to require MDU owners to allow the construction of multiple sets of inside wiring, including home run wiring, in their buildings. Using the Commission's analysis, there is nothing in the Communications Act which expressly prohibits the FCC from adopting such a requirement;[21] the requirement would "afford[] the widest range of

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[17] Id.

[18] Id. at ¶ 62. See also ¶ 81 ("we believe that Congress intended for Section 624(i) to promote individual subscriber choice whenever possible").

[19] Id. at ¶ 62.

[20] See Part II(A), supra.

[21] Although some court cases have held that cable operators may not bring a private action under Section 621 of the Communications Act to secure access to private property, see Media General Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners, 991 F.2d 1169 (4th Cir. 1993), Cable Investments,

competitive opportunities," which "is necessary to effectuate the purposes of the Communications Act;"[22] and, the requirement would be much more effective in achieving the Commission's stated goals than the proposal it is considering. Any concerns about interfering unnecessarily with MDU owners' property rights would be greatly reduced because the MDU owner already has allowed (whether voluntarily or through operation of state law) the installation of at least one other communications network in its building. Moreover, potential Fifth Amendment problems could be readily avoided by adopting rules which ensure that MDU owners are justly compensated by the new service provider for the costs of installing a second wire and for any diminution in value to the MDU that may occur as a result of the installation. Accordingly, Cox urges the Commission to require MDU owners to allow the installation of multiple broadband networks, including multiple sets of home run wiring, should it embrace the legal interpretation of Section 4(i) set forth in the Further Notice.

III. IF THE COMMISSION PROCEEDS WITH ITS PROPOSAL, MODIFICATIONS SHOULD BE MADE TO BETTER SERVE SUBSCRIBERS AND INCUMBENT PROVIDERS.

A. The New Rules Should Apply Only in Limited Circumstances

In the event the Commission proceeds with the proposals described in the Further Notice, it should modify the proposals to ensure that they will best achieve the Commission's stated objectives. Specifically, the new rules should not apply where the MDU owner receives direct or indirect consideration from the alternative video service

Inc. v. Woolley, 867 F.2d 151 (3rd Cir. 1989), those decisions do not address the Commission's authority to adopt a rule requiring MDU owners to grant such access.

[22] Further Notice at ¶ 54 (footnote omitted).

provider it has selected, or where the MDU owner signs an exclusive contract with that provider.

First, the Commission's tentative conclusion that landlords typically serve their tenants' interests[23] is invalid where the landlord selects a particular provider to derive a personal financial benefit from the contract, rather than to offer its tenants the best video service available. To ensure that an MDU owner in fact is acting in its tenants' interests, the Commission should not permit the owner to take advantage of the new rules where the owner will receive consideration from the new service provider. Such a condition would be consistent with a number of state statutes which prohibit landlords from demanding or accepting payment of any kind from a provider of cable television service in exchange for allowing access to that service.[24]

Second, the Commission also should not let an MDU owner take advantage of the new rules where it plans to replace the incumbent by signing an exclusive contract with the new service provider. As Cox demonstrated in its earlier comments in this proceeding, competition in MDUs is hampered, not helped, by exclusive service contracts.[25] Requiring landlords and their new service providers to avoid exclusive

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[23] Further Notice at ¶ 47.

[24] See, e.g., VA. CODE ANN. § 55-248.13:2 (Michie 1995)("No landlord shall demand or accept payment of any fee, charge or other thing of value from any provider of cable television service, satellite master antenna television service, direct broadcast satellite television service, subscription television service or service of any other television programming system in exchange for giving the tenants of such landlord access to such service . . . ."), N.Y. PUBLIC SERVICE LAW, ART. 11 § 228(1)(b) (McKinney 1996), N.J. REV. STAT. § 48:5A-49 (1972)(amended 1982, 1983), ME. REV. STAT. ANN. tit. 14, § 6041 (west 1996), R.I. GEN. LAWS § 39-19-10 (1996), W. VA. CODE § 5-18A-4(a)(2)(1997), D.C. CODE ANN. § 43-1844.1 (1981)(amended 1983), V.I. CODE ANN. tit. 30 § 317 (1997). To avoid a takings claim, some of these states allow reasonable compensation to the landlord upon approval of an administrative or judicial authority where access to buildings also is mandated by the statute. See N.Y. PUBLIC SERVICE LAW, ART. 11 § 228(1)(b), D.C. CODE ANN. § 43-1844.1, ME. REV. STATE. ANN. tit. 14, § 6041, R.I. GEN. LAWS § 39-19-10 (1996), W. VA. CODE § 5-18A-4(a)(2).

[25] See Comments of Cox Communications, Inc. (filed March 18, 1996) at 27.

arrangements if they wish to avail themselves of the proposed rules will help promote a competitive environment and individual subscriber choice within the MDU.

B. Incumbent Operators Must Be Able to Exercise Their Rights Under State and Local Law

As the Further Notice states repeatedly, the proposed rules are to apply only "where the incumbent has no legally enforceable right to remain on the premises."[26] The new rules therefore must give the incumbent operator sufficient opportunity to exercise whatever rights it might have under contract or state and local law in an unbiased and timely fashion. If, for example, there is a dispute over whether the operator's service has been properly terminated, or whether the operator has a right to keep its wiring in the building despite service termination, the operator must be permitted to have that dispute resolved by a court before the FCC's procedural deadlines apply.

The proposed rules therefore should be revised to require an operator who has been notified by the landlord that its service is being terminated to in turn notify the landlord within 30 days that it has property or contract rights it intends to pursue. This notification should toll the FCC's procedural deadlines until the issue had been resolved either by the parties or, if necessary, by a court.[27] To ensure that the incumbent did not simply sit on its rights and toll the deadlines indefinitely, the rules also could require the incumbent to file any necessary court action within 30 days after notifying the landlord that it has legal rights it intends to enforce.

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[26] See, e.g., Further Notice at ¶¶ 34, 46.

[27] Filing a court action may not always be required to resolve the issue. For example, the operator may need only to remind the landlord that its service contract governs the disposition of the inside wiring upon service termination.

Giving the incumbent operator adequate time to enforce its rights is the only way of meeting the Commission's objective of not overriding or preempting applicable state and local law. For the same reason, the Commission should not adopt a presumption that operators do not have an enforceable right to maintain their wiring on the premises when service is terminated. Given the wide range of possible outcomes in litigation throughout the states on this very issue,[28] there is, and can be, no factual basis for such a presumption. Moreover, by adopting a presumption, the Commission would only be injecting itself into disputes over the nature and extent of the operator's legal rights -- a troublesome course worth avoiding. Indeed, the agency lacks not only the resources and the legal authority but also the expertise to become involved in judicial proceedings involving highly-localized questions of state and local contract, property and landlord/tenant law.

Finally, the Commission must make clear that any new procedural rules do not preempt video service contracts, and that landlords will be bound by contractual terms governing the disposition of inside wiring to which they have agreed. Cox for some time has been using a standard, non-exclusive MDU contract with a five-year term which provides that, upon service termination, either the landlord will purchase the inside wiring or Cox will remove the wiring from the premises. As Cox demonstrated earlier in

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[28] Whether the operator will be found to have a legally enforceable right to remain on the premises will depend on a variety of factors, including the nature of the contract between the operator and the MDU owner, the history of their relationship and the requirements of statutory and common law, which vary significantly from state to state. Whenever a cable operator also is providing telecommunications services over its facilities, it will have enforceable rights under Section 253(a), which preempts any "legal requirement" that could have the effect of "prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a).

this proceeding,[29] the Commission does not have authority to abrogate existing contracts. Nor, in the case of Cox's reasonable contract terms, should it want to. The Further Notice also clearly states the Commission's intention not to "preempt an incumbent's ability to rely upon any rights it may have under state law,"[30] such as contract rights created after adoption of the new rules. Cox thus disagrees with the suggestion in the Further Notice that the MDU owner can choose to follow either the dictates of its video service contract or the FCC's procedural rules.[31] For both legal and policy reasons, MDU owners must not be permitted to ignore contract terms to which they themselves voluntarily agreed to be bound.

C. The Commission Should Give Incumbents a Meaningful Opportunity to Sell Inside MDU Wiring Upon Service Termination

Although the Further Notice asserts that the proposed rules are designed to ensure a smooth transition in MDUs from one video service provider to another, they are not fair to incumbent operators because they essentially deprive incumbents of the option of selling the inside wiring on reasonable terms to the MDU owner or alternative provider. Although the proposed rules purport to give the existing operator three choices when video service is terminated – sale, removal or abandonment – the operator would be highly unlikely to be able to sell the wiring because the potential purchasers would have no obligation to purchase it at a reasonable price. Instead, the proposed rules provide that the parties would have 30 days in which to reach agreement over a purchase price. If the parties could not agree on a price, then the operator would have to choose between

[29] See Letter from Peter H. Feinberg, Esq., Counsel to Cox Communications, Inc., to Meredith J. Jones, Esq., Chief, Cable Services Bureau (January 31, 1997).
[30] Further Notice at ¶ 34.

removing the wiring or abandoning it.[32] This process would enable an MDU owner or alternative provider simply to hold out for an unreasonable price and avoid purchasing the wire from the incumbent, even though the incumbent had selected the sales option.

As the Further Notice suggests,[33] operators must be given a reasonable opportunity to sell their inside wiring in order to avoid an unconstitutional "taking" in violation of the Fifth Amendment. A government requirement that limits the operator to either removing or abandoning the wiring deprives the incumbent of the "just compensation" to which it is constitutionally entitled. The value of the wire and associated equipment would be diminished as a result of their removal, particularly if the wiring or equipment were damaged in the process. Removing the wiring also would force the operator to incur additional, significant expense for which it would need to be compensated in order to satisfy constitutional requirements. Similarly, forcing the operator to abandon the wiring (and the substantial investment associated with it) also would not pass constitutional muster if the operator were not compensated for it.[34] In short, operators must be given a meaningful opportunity under the FCC's rules to sell their MDU wiring, and be duly compensated therefor, if the Fifth Amendment's requirements are to be met.

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[31] Id. at n.97.
[32] Id. at ¶ 40.
[33] Id. at ¶ 72.
[34] It is important to note in this context that the power to declare property abandoned is strictly limited. As the Supreme Court has explained, "[i]t is the owner's failure to make any use of the property – and not the action of the state – that causes the lapse of the property right[.]" Texaco, Inc. v. Short, 454 U.S. 516, 530 (1982); see also Wilson v. Iseminger, 185 U.S. 55 (1902) (abandonment results from failure of property owner to pursue available remedies). Abandonment thus requires an affirmative intent to abandon the property, which cannot be deemed to exist by providing the property owner with a set of unreasonable and noncompensatory "alternatives" to abandonment.

Accordingly, the Commission should modify the sales option by establishing, first, that a reasonable price for the sale of MDU inside wiring is the replacement cost of installing the wiring (including materials and labor). A replacement cost standard would fully account for the cable operator's considerable investment in labor, plant and equipment associated with MDU inside wiring, including home run wiring.[35] Moreover, any lesser standard would result in a windfall to the purchaser (whether the MDU owner or the alternative provider). That is, the new regulations should not make purchasers better off than they would be in the absence of the rules. If purchasers were to install MDU wiring themselves, they would have to pay the full replacement cost.

The proposed rules also should provide that where the incumbent has selected the sales option and the landlord or alternative provider refuses to purchase the inside wiring at replacement cost, the landlord must either (a) allow the operator to maintain its wiring on the premises and preclude other uses or (b) request that the operator remove the wiring at the landlord's expense. If the landlord doesn't wish to pay for the wiring, then it shouldn't object to the operator keeping the wiring in the MDU and precluding others from using it. The wiring, after all, belongs to the operator, not the landlord. Moreover, allowing the incumbent to keep its wiring in the building under these circumstances facilitates competition, since the incumbent may later have the opportunity to offer other, non-video services to the MDU tenants over the same wiring. Alternatively, if the landlord doesn't want to pay for the wiring but nonetheless insists that it be removed,

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[35] Unlike wiring within an individual subscriber's premises, the costs associated with the construction of inside wiring, including home run wiring, are not recovered in the subscriber's installation charge. Compare Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring, Report and Order, 8 FCC Rcd 1435, 1438 and n.39 (1993).

then the landlord should bear the expense of removing it. As discussed above, if the Commission's interpretation of its broad authority under Section 4(i) is valid, it has ample authority to implement these provisions.

D. The Commission Should Not Require Inside Wiring to Be Sold Upon Installation.

The Further Notice seeks comment on whether the Commission should require video service providers to sell inside wiring to MDU owners once the wiring has been installed.[36] For the reasons discussed above,[37] Cox does not believe that the Commission has the legal authority to adopt such a rule. It also does not believe that such a requirement would serve the public interest.

Landlords already are free to negotiate for ownership of MDU inside wiring, and some in fact do so. Other building owners, by contrast, are not interested in purchasing the wiring. And, a number of service providers do not wish to sell it, particularly since they remain responsible for maintenance and for compliance with the Commission's signal leakage requirements in any event. In addition, forcing service providers to sell the inside wiring could deprive them of rights they might otherwise have under state law (or might negotiate in their service contracts) to maintain that wiring in the building even after video service is terminated, and potentially provide other services over it.

As discussed above, the real problem the Commission is trying to address is MDU owners' resistance to allowing the installation of multiple sets of inside wiring, including

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[36] Further Notice at ¶ 85.
[37] See Part II(A), supra.

home run wiring. Requiring video service providers to sell their wiring to MDU owners upon installation would do little to solve this dilemma. The Commission therefore should not adopt such a requirement, but rather should permit the marketplace to continue to operate freely.

IV. CONCLUSION

The Communications Act of 1934, as amended, gives the Commission limited authority to deal with the disposition of cable wiring inside MDUs when cable service is terminated. That authority permits the Commission to adopt rules governing the wire inside the individual subscriber's unit, but no more. In the event the Commission takes a much more expansive view of its authority in this area, however, it should exercise the full extent of that power and require MDU owners to permit the installation of multiple broadband networks, including multiple sets of home run wiring, to be used for video and non-video purposes. Such a rule would most directly and effectively solve the problem identified by the Commission and faced by cable operators and alternative video service providers alike. If the Commission decides instead to pursue the proposals described in the Further Notice, Cox requests that the modifications discussed above be incorporated into the final rules.

Respectfully submitted,

COX COMMUNICATIONS, INC.

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September 26, 1997